To be argued by Blanch Freedman

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 431

BRUCE G. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANCISCO, CALIFORNIA, PETITIONER,

v.

PEDRO GONZALES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

BLANCH FREEDMAN
220 Broadway
New York City, New York

GLADSTEIN, ANDERSEN & LEONARD
by LLOYD E. McMURRAY
240 Montgomery Street
San Francisco, California
Counsel for Respondent

On the brief:

BLANCH FREEDMAN
LLOYD E. McMURRAY
DAVID M. FREEDMAN

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Opinions Below

The majority and dissenting opinions below (R. 25-35) are reported at 207 F. 2d 398.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). Judgment of the Court of Appeals herein was entered on September 15, 1953 (R. 36). Petition for a writ of certiorari was granted on December 14, 1953 (R. 38).

Question Presented

Whether respondent, born a national of the United States, in the Philippine Islands, who came to continental United States as such national prior to the enactment of the Philippine Independence Act of 1934, and who was sentenced to imprisonment in 1941 and 1950 for crimes claimed to involve moral turpitude, may now be deported under Section 19(a) of the Immigration Act of 1917.

Statutes Involved

The statutes involved are set forth in the Appendix, infra, pages 29-30.

Statement

The statement of the case as set forth in Petitioner's brief (pp. 3-5) contains all that is material to the consideration of the questions presented to this Court.

ARGUMENT

Introduction

Respondent was ordered to be deported from this country under the authority of Section 19(a) of the 1917 Immigration Law [8 U. S. C. A. 155(a)]. The pertinent provision of that section reads:

> * * * any alien who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime in-

volving moral turpitude, committed at any time after entry; * * * shall * * * be * * * deported * * *. The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, * * * make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter. * * *

The area of applicability of the foregoing provision is quite explicit. It makes deportable specific persons, to wit:

(1) any alien who is sentenced to imprisonment because of commission of crime involving moral turpitude;

(2) and the conviction took place in this country for an act committed "after the entry of the alien to the United States."

It follows therefore, that no valid order of deportation can be predicated under this provision, without a showing that the subject of deportation

(1) is presently an alien;

(2) that he was an alien when sentenced to imprisonment for crime involving moral turpitude; and

(3) that such crimes were committed after he entered the United States as an alien.

Respondent contends as a matter of law, that all three foregoing preconditions for the issuance of an order of deportation against him, are wanting. The court below agreed that the third condition had not been established,

in that respondent having come to continental United States as a national of this country, had not made the "entry" required by the section (R. 27).

The government in its brief, in effect, argues that the words "after entry" in the statute are meaningless and should be disregarded; or, if they are to be given meaning, the term "entry" should be given a meaning other than what has been heretofore judicially ascribed to it. Neither position has merit.

I

"Entry" into the United States is a precondition to deportability under Section 19(a) of the Immigration Act of 1917. Respondent did not "enter the United States" within the meaning and concept of the term "entry".

A. *"Entry" is a precondition.*

In construing and applying Section 19(a), the courts have repeatedly held the making of an "entry" into the United States to be an essential pre-requisite for "bringing into play' the moral turpitude provisions of that section. *United States ex rel.* v. *DiPasquale* v. *Karnuth,* 158 F. 2d 878; *United States ex rel. Delgadillo* v. *Carmichael,* 332 U. S. 388; *Carmichael* v. *United States ex rel. Delaney,* 170 F. 2d 239; *Del Guercio* v. *United States ex rel. Gabot,* 161 F. 2d 559.

The government suggests that "entry" as a precondition, is essential only in relation to the first part of the moral turpitude provision which refers to conviction of a crime "committed within five years after the entry of the alien," since it there serves to toll the statute, and should be ignored as to the latter part which refers to an alien

sentenced more than once for crimes "committed at any time after entry." That interpretation would ignore and defy the explicit language of the law. The term "after entry" is used twice, once after the 5 year portion and again after the more than one crime portion. It clearly cannot mean one thing in one line and mean something else, or nothing at all, two lines later. If Congress attached no significance to the words "after entry," the sentence could well have ended with the words "committed at any time." Compare Section 157 of 8 U. S. C. A., where deportation is directed for commission of specified offences without reference to "entry."[1] As the court below aptly said:

> The meaning of a term used in a statute cannot mean one thing for one situation and something else for a different situation, else the law would not have that reasonable certainty which the people have a right to expect. (R. 28)

The words "after entry" having been employed in the statute and, clearly, deliberately so employed, they must be given their meaning and applied.

> Where the language of the act is unambiguous and explicit, courts are bound to seek for the intention of the legislature in the words of the Act itself, and they are not at liberty to suppose that the legislature intended anything different from what their language imports. *New Lamp Chimney Co.* v. *Ansonia Brass & Copper Co.*, 91 U. S. 656, 663.

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1 Government's contention would make liable for deportation all native born American citizen women who became aliens by marriage prior to 1922, to an alien, and who had committed while citizens, two specified offences.

B. *Respondent never came from a foreign jurisdiction.*

The term "entry" used in Section 19(a) is neither vague nor ambiguous. Clearly defined by this court and so applied, it is composed of two elements: (1) a coming to the United States from a place of foreign jurisdiction, of (2) a person who is an alien at the time of such coming. In *United States ex rel. Volpe* v. *Smith* (1933), 289 U. S. 422, 425, the Court said:

> We accept the view that the word "entry" in the provision of Sec. 19 * * * includes *any coming of an alien from a foreign country* into the United States * * * (emphasis supplied)[2]

Absent the factor that the coming is from a foreign land, there is no entry under the immigration law. In *United States ex rel. Claussen* v. *Day* (1929), 279 U. S. 398, the Court declared (p. 401):

> The word "entry" by its own force implies a coming from outside. The context shows that in order that there be an entry within the meaning of the Act there must be an arrival from some foreign port or place. There is no such entry where one goes to sea on board an American vessel from a port of the United States and returns to the same or another port of this country without having been in any foreign port or place.[3]

The decision of this Court in *United States ex rel. Delgadillo* v. *Carmichael,* 332 U. S. 388, where the alien was torpedoed into a foreign country while on his way from

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2 This definition and understanding of "entry" has been followed and applied constantly by the courts. See *United States ex rel. Delgadillo* v. *Carmichael* (1947), 332 U. S. 338; *United States ex rel. Di Pasquale* v. *Karnuth* (1947), 158 F. 2d 878; *United States ex rel. Schlimmgen* v. *Jordon* (1948), 164 F. 2d 633; *Del Guercio* v. *United States ex rel. Gabot* (1947), 161 F. 2d 559.

3 Followed in *United States ex rel. Stapf* v. *Corsi* (1932), 287 U. S. 129, 132.

one United States port to another, does not alter or impair this basic concept and meaning of "entry." On the contrary, it strengthens that concept by insisting that a "statutory entry" means there must be an *actual coming from* a foreign place to constitute an entry. This, too, was the rationale of *United States ex rel. DiPasquale* v. *Karnuth*, 158 F. 2d 878, where the alien was whisked through a foreign country while asleep on a train and *Carmichael* v. *United States ex rel. Delaney*, 170 F. 2d 239, where the alien was in foreign territory while serving with the United States armed forces. This concept of "entry" as developed by the courts have now been embodied in the statute law on the subject. Section 101(a)(13) of the Immigration and Nationality Act of 1952 (66 Stat. 167).[4]

It is undisputed that respondent came to the port of San Francisco in 1930, from the Philippine Islands. The Philippine Islands at that time, and since 1899, were a possession of the United States and hence, not foreign territory. *Fourteen Diamond Rings* v. *United States* (1901), 183 U. S. 176, 178, 179. Coming to continental United States from a possession of the United States was not coming from a foreign port or land. 8 U. S. C. A. 173; *United States ex rel. Claussen* v. *Day* (1929), 279 U. S. 398.

When a native of Norway arrived at Boston from Ponce, Puerto Rico, a United States possession in 1903, the solicitor of the Treasury Department had held:

> An alien passenger coming from a port of Porto Rico to a port of the United States proper is not a person coming from a foreign port." In the opinion of the solicitor, the Department concurs. (Treasury Dept. Decisions. Vol. 6. Thurs. April 30, 1903, p. 18.)

No case has ever held otherwise.

4 Section 101(a)(13) [8 U. S. C. A. 1101(a)(13)] provides: "the term 'entry' means any coming of an alien into the United States from a foreign port or place or from an outlying possession, * * *."

Respondent never made an "entry" into the United States since he did not come here from any foreign jurisdiction.

C. *Respondent was not an alien when he came to San Fransisco, California.*

Moreover, respondent could not have made an "entry" into continental United States as he was not an alien at the time he came here. As is manifest from the decisions cited above, an "entry" connotes the arrival of an *alien. United States ex rel. Volpe* v. *Smith, supra.*

This is particularly true as the term is used in the "moral turpitude" provision of Section 19(a). As pointed out above, not only does the section commence with the words "any alien who", but the specific provision embodies the expression, "after the entry of the alien to the United States." So that the only kind of entry contemplated by this law, if the term "entry" has more than one meaning, is entry by an *alien.*

In *Del Guercio* v. *United States ex rel. Gabot,* 161 F. 2d 559, Gabot was a native of the Philippine Islands, who had gone into Mexico from continental United States and then returned. In discussing whether he had entered the United States within the meannig of Section 19(a), the Court said (p. 561):

> * * * Gabot was a national of the United States * * *
>
> In summation we hold, as did the trial judge, that Gabot was not an alien when he crossed the international line in March, 1934, and that legally he could not be considered an alien at that time so as to bring the "turpitude" statute into play.
>
> If the circumstances in this case were such as to justify the consideration of Gabot as an alien, we would hold the crossing from Mexico to the United States as an "entry".

Respondent having been born in the Philippine Islands in 1913, while it was a possession of this country, was a national of the United States like Gabot in the foregoing cited case. *Toyota* v. *United States,* 268 U. S. 402, 411; *Gonzales* v. *Williams,* 192 U. S. 1.

He came to San Francisco, California from the Philippines in 1930 as a United States National (R. 9), and ever since, has lived and resided in continental United States (R. 9), so that he at no time came to the United States or any part of it as an alien. It follows, therefore that respondent never made an "entry" into this country within the contemplation of the law.

Unable to establish an entry by respondent, the government urges that since he is physically present in the country, an "entry" should be presumed. This would do violence to numerous decisions of the courts dealing with expulsion and exclsuion. Indeed, it would destroy the underlying law of exclusion. See *United States ex rel. Kaplan* v. *Todd,* 267 U. S. 228, 231;[5] *Shaugnessy* v. *United States ex rel Mezei,* 345 U. S. 206, 213.

In the instant case, the government looks to the language of the court below, made some 37 years ago in *United States* v. *Kumi Yomamoto,* 240 Fed. 390; *United States* v. *Sui Joy,* 240 Fed. 392; See also *Toma Miyake* v. *United States,* 257

5 In *Kaplan* v. *Tod* (*Supra*) the alien at the age of 13 was excluded in 1914 on entry as being feeble minded. She was nevertheless, permitted to physically enter the United States and physically lived with her mother and father for a period over 10 years. Action by the immigration authorities to deport her 10 years later in 1923, was resisted on the ground that she was no longer an alien, that she had become since her "entry" into the United States, a citizen by the naturalization of her father while she was a minor dwelling and living in this country. The government argued in the *Tod* case—(and successfully) that although physically present in the United States, she could not "* * * be said to have lawfully entered the country so that she may 'dwell' therein, until [she] has been admitted pursuant to * * * immigration laws." [*Kaplan* v. *Tod*, Govt. brief p. 17.] This court concurred with such interpretation of entry and dwelling and held "the appellant never has entered the United States within the meaning of the law" (p. 231).

Fed. 732. The issue in all three cases was whether persons who were aliens in Hawaai before annexation in 1898, and after annexation remained and continued to be alien residents thereof, were subject to deportation for practicing prostitution or receiving the proceeds from such practice at any time "after entry". The Court in the circumstances of that case, construed the word entry in a physical sense of being in the United States. However, the Court was mindful to point out that "the Territory of Hawaai may in a sense be said to have entered the United States by its annexation". Actually, what obtained in that situation was a legal "entry" or incorporation into the United States of an entire land with its inhabitants, some entering in contemplation of law as nationals and others as aliens. Yomamoto had "entered" the United States after the annexation, as an alien. The government does not represent to this Court that these cases are dispositive of the present case. (Govt's brief, p. 21)

In a similar vein of reasoning, the government adverts to the employment of the word entry in Section 326 of the 1952 Immigration Act, 8 U.S.C.A. 1437 and its predecessor 8 U.S.C.A. 721. The significance of these sections is that for the limited and restricted purposes of petitioning for naturalization only, by a Filipino, the word entry is to mean a coming by such Filipino at any time prior to May, 1934 from any place outside of what was on July 4, 1946 (and in 1952) deemed to constitute the United States. On July 4, 1946, the United States meant continental United States "and any water, territory or other place subject to the jurisdiction thereof, * * *" The Philippine Islands, as of that date, were foreign territory. Similarly, the current Immigration and Nationality law, 8 U.S.C.A. 1101(a)(38), defines geographical United States to mean "continental United States, Alaska and Hawaii."

In short, far from establishing a new concept of the term "entry," Congress by this provision, created for naturalization purposes only, a constructive "entry" for Filipinos within the legal concept and intendment of that term and as specifically defined by Congress in 8 U.S.C.A. 1101(a)(13). Compare 8 U.S.C.A. 707(d)(2) and 725 creating constructive United States residence for seamen sailing American ships for 5 years.

D. *Presence here of a large number of Filipinos does not alter meaning of term "entry".*

The government is very agitated that if the section is enforced as it reads, it will be inapplicable to 45,000 persons who as United States nationals came from the Philippine Islands to this country and now reside here. It practically suggests that these 45,000 persons are thus invited to commit crimes with impunity since they will not be subject to expulsion. Such a suggestion conveying a veiled sense of horror and fear that so many criminals are escaping deportation, ill becomes the government representative making it. Far from being horror-stricken, it would appear that the government should welcome the fact that 45,000 persons who have been our nationals and hence our responsibility and concern from 1899 until at least 1946, are protected by existing legislation instead of injured by it. Indeed, as to such persons who are or have been our nationals, it is particularly pertinent to follow the justices of this Court who said:

> * * * I deem it my duty not to squeeze the Act * * * so as to yield every possible hardship of which its words are susceptible * * * (Dissenting opinion, *United States ex rel. Eichenlaub* v. *Shaughnessy*. 338, U. S. 521, 533)

There is nothing novel in the idea that groups of people are excluded from legislative classification. This very act excluded all crimes committed prior to 1917 from consideration and thus exempted all aliens who may have committed them from its sanction. Again, the 1924 Immigration Act was construed to completely bar for illegal entry, the deportation of those who had entered the United States prior to July 1, 1924. *Philippedes* v. *Day,* 283 U. S. 48; *United States ex rel. Stapf* v. *Corsi,* 287 U. S. 129, 131, 132. Many other examples is other laws could be cited.

The substance of the government's position is that regardless of prior definition and understanding of "entry", that word should now be read as it requests because otherwise the 45,000 natives of the Philippine Islands who have been resident here prior to 1934, will not be covered by it. We submit that the meaning of the law is not to be determined by the number of people it does not embrace.

Furthermore, there is nothing in the language of Section 8(a) of the Philippine Independence Act from which can be inferred rationally, any intent of Congress to have the Immigration laws applied to Filipinos differently from their general application.

II

Alienage at time of each sentence to imprisoment for crime involving moral turpitude is essential precondition for deportation under that provision of Section 19(a). Respondent alien was not an alien when he was sentenced.

A. *Alienage at time of sentencing to imprisonment is essential precondition.*

The provision of Section 19(a) under which respondent was ordered to be deported states as clearly as language can, that its sanction was intended to apply to aliens com-

mitting the proscribed acts. The sanction of deportation becomes operative at the moment of sentence. The government seeks to have this provision enforced as if it read "any alien who has been sentenced because of conviction, etc." Its emphasis is on the word alien, and it argues that if the realtor is now an alien who was sentenced, it is immaterial what his status was at that time—he is now deportable. This ignores the plain language as well as the intent of the provision.

The statute in words does not apply to aliens who have been sentenced. It reads very specifically, "any alien *who* * * * *is sentenced*" (emphasis supplied). In effect it is saying that an alien who is sentenced, opens himself up to the penalties of the law at that very moment. It is a warning and hence a deterrent. It serves notice that an alien committing crime becomes subject to deportation. In short, this specific provision commands deportation not for past offenses but for present ones. To be deportable thereunder the sanction must apply when sentence is pronounced.

The choice of language used is not accidental, it is manifestly purposeful. When Congress desired to make past offenses a ground for deportation, in the very same Section 19(a) it used appropriate language. Thus, it provided that "any alien *who was convicted* * * * prior to entry of a felony or other crime * * * shall * * * be * * * deported." (Emphasis supplied.)

The Congressional intent that the "moral turpitude" provision of Section 19(a) be applicable only to aliens committing crime is further evidenced by the qualifying provision with respect thereto in the same section.

> The provision of this section respecting deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned,

> *nor shall* such *deportation be made* or directed *if the court, or judge* thereof, *sentencing such alien* for such crime shall, *at the time of* imposing judgment or passing *sentence* or within thirty days thereafter * * * *make a recommendation* to the Attorney General *that such alien shall not be deported* in pursuance of this chapter. (Emphasis supplied)

Naturally, if a person is not an alien at the time of sentence there would be no occasion for the court to make or the offender to request a recommendation to the Attorney General. The existence of this provision can make sense only if the punitive provision is applied as it reads,—to persons who when sentenced, are aliens.

In *Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, four justices of this Court construed 8 U. S. C. A. 157 (Act of May 10, 1920, 41 Stat. 593) as not requiring a conjunction of alienage and conviction to warrant deportation under that section. However, the statute there read:

> * * * aliens of the following classes * * * shall * * * be deported * * * *aliens who* since August 1, 1914 *have been* or may hereafter be convicted of any violation * * * of* * * [the Espionage Act of 1917]. (Emphasis supplied.)

The language there used was in the past tense, it made past conduct deportable. In that respect, it differs materially from the provision in Section 19(a) involved here, in which the language is entirely in the present tense, making conduct as an alien only deportable.

Nothing contained in the legislative history of Section 19(a) (Govt's brief, pp. 13-16) impels a conclusion as to its meaning, other than as here contended. Conceded, that the general purpose of the section was to rid the United States of undesirable aliens, it does not follow that any

alien the government deems undesirable is deportable. Only those specifically categorized may be thus summarily dealt with. The fact is that Congress itself provided limitations on the applicability of the very provision we are considering. Moral turpitude crimes committed before 1917 were exempted; recommendation of a court against deportation was provided; "entry" was made a precondition.[6]

That alienage at the time of the sentencing was essential to make operative the "moral turpitude" provision of Section 19(a) was the basis of the court's decision in *Del Guercio* v. *United States ex rel. Gabot, supra.* So, too, in this case, the court below did not question that alienage was essential at time of sentence, but it accepted the theory of the government that under Section 8(a)(1) of the Philippine Independence Act of 1934 (48 Stat. 456, 462) the respondent was to be considered as an alien when he was sentenced in 1941 (R. 26-27).

B. *Respondent was not an alien when sentenced for at least one of the crimes, upon which the deportation proceeding is based.*

Respondent was charged in the deportation proceeding with having "been sentenced more than once to imprisonment * * * because * * * of crimes" (R. 25). The sentences in question took place in May or June, 1941 (R. 9) and in 1950 (R. 10). It is respondent's contention, that irrespective of his political status in 1950, at the time of the second offense, he was not an alien in this country in 1941 at the time of his first sentence.

There can be no doubt that having been born in the Philippine Islands about 1913 (R. 9) he was born a national of this country, and having resided only there and then in continental United States (R. 9), he remained such a national until the enactment of the Philippine Independence

6 See for example *Di Pasquale* v. *Karnuth*, 158 F. 2d 878, 879.

Act of 1934 (48 Stat. 464). It has since been held that by the terms of that act, native Filipinos residing here remained nationals of this country until the proclamation of the political independence of the Philippine Islands in 1946 (61 Stat. 1174) and Presidential Proclamation No. 2695 (11 F. R. 7517). *Cabebe* v. *Acheson*, 183 F. 2d 795; *Mangaoang* v. *Boyd*, 205 F. 2d 553, cert. denied 346 U. S. 876. Indeed, in the instant case, the court below held that "Gonzales became an alien on July 4, 1946, upon the proclamation of Philippine Independence" (R. 26).

Respondent was therefore not an alien in 1941 and hence not an alien when he was sentenced in that year for his first offense. Not being an alien at that time, he was not an "alien who is sentenced" and is therefore not subject to the provision of Section 19(a) upon which he was charged for deportation.

The government urges, however, that even though he was not an alien in 1941, he should be treated as one and relies upon the provisions of Section 8(a) of the Philippine Independence Act of 1934 (48 Stat. 462) in support of its contention. That section provided:

> Effective upon the acceptance of this Act by concurrent resolution of the Philippine Legislature or by a contention called for that purpose, as provided in section 17—
>
> (1) For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except section 13(c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. *For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty.*" (Emphasis supplied.)

The government says that section was intended to apply to respondent and all other Filipinos living in this country in 1934. We submit this is a distortion and misapplication of this section. The 1934 Act in its entirety made provision for the ultimate independence of the Philippine Islands and provided a *modus vivandi* for the relations between their government and ours during the interval of 10 years between their adoption of the Act and the day of independence. Section 8(a) established the relationship that should exist between the two countries with respect to immigration there from here. It fixed an annual quota that would be admittable and specified that all laws of our country dealing with entry, exclusion and expulsion would apply to them. If the provision as to quota preceded the provision about the applicability of our Immigration Laws to citizens of the Philippine Islands in this Section 8(a), it would be crystal clear that what was provided for here was simply the relationship between the two places on the question of immigration from that time. It had nothing to do with the status of United States nationals of Filipino birth residing here.

If this is not clear from the internal language of Section 8(a) itself, and its context with the rest of the Act, the existence of Section 14 of that Act certainly disposes of the question. That section provided:

> Upon the final and complete withdrawal of American sovereignty over the Philippine Islands the immigration laws of the United States (including all the provisions thereof relating to persons ineligible to citizenship) shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries.

If Section 8(a) was intended to effect persons born in the Philippine Islands who were then residing in the United

States, Section 14 was entirely meaningless and superfluous for such persons would have been subject to those laws for at least 10 years prior to final and complete withdrawal of American sovereignty over the Philippine Islands. But Section 14 was neither meaningless nor superfluous. Whatever Congress may have intended to accomplish thereby, it clearly intended that persons born in the Philippine Islands, *who were not living there and who would therefore not be subject to the Immigration Laws made applicable to such residents by Section 8(a), should become subject to those laws when independence was complete.*

The limitation of Section 8(a) to direct relations between the Philippine Islands and the United States only, is further borne out by Section 2 of the amendment to the 1934 Act adopted August 7, 1939 (53 Stat. 1226), which reads:

> Sec. 2. Sec. 8 of the said Act of March 24, 1934, is hereby amended by adding thereto a new subsection as follows:
>
> (d) Pending the final and complete withdrawal of the sovereignty of the United States over the Philippine Islands, except as otherwise provided by this Act, citizens and corporations of the Philippines shall enjoy in the United States all of the rights and privileges which they respectively shall have enjoyed therein under the laws of the United States in force at the time of the inauguration of the Government of the Commonwealth of the Philippine Islands.

It will be noted that Section 8(a) of the 1934 Act refers to "citizens of the Philippine Island who are not citizens of the United States", while the 1939 amendment preserving all rights refers broadly to "citizens and corporations of the Philippines". Since the immigration laws referred to in Section 8(a) do not apply to citizens of the United States that reference to them would have been strange indeed,

except that since the section was applying to people living in the Philippine Islands, it was making clear that United States citizens living there were not becoming subject to our immigration laws, even if they were also citizens of the Philippines. The 1939 amendment apparently was intended to clarify the congressional intent that pending independence, no rights of Filipinos, citizens or corporations, in this country were impaired by the 1934 Act, except as specifically set forth therein. The protection of that amendment was naturally intended to include citizens of the Philippines here in this country or there and those who were citizens of this country or only nationals. The status of respondent as a national of this country was thus further fortified by the 1939 amendment.[7]

It follows, that in no event did relator become subject to the immigration laws, or Section 19(a) thereof, until July 4, 1946, when Philippine independence was proclaimed.

Moreover, the Philippine Independence Act by its own terms expired upon the grant of Philippine independence on July 4, 1946. It was never thereafter extended and it is clear from the statute of independence (60 Stat. 1352) and the proclamation announcing it, that thereafter the immigration and naturalization laws of the United States should apply to alien Filipinos as it applied to other aliens. The 1934 statute having expended itself in 1946, its provisions cannot be resorted to in 1951 when this deportation proceeding was commenced, to find a hook upon which to hang this respondent. For concededly, if Section 8(a) could not be applied to relator, his 1941 sentence occurred while he was a national and not an alien, and there would be no statutory basis whatever for the present deportation proceeding.

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7 During World War II, Filipinos in the United States were nationals, subject to the draft laws, and therefore could not claim immunity from service in the United States armed forces by asserting alienage. (Selective Service Rules & Regulations, Local Board Memo #112.)

III

Present alienage is a precondition to deportability under Section 19(a) of the Immigration Act of 1917. Respondent is not an alien.

A.

The all-embracing issue before this Court is whether the respondent is now an alien. Obviously, if he is not an alien, the deportation proceeding against him must fall. Concededly, he was not an alien at any time in his life prior to July 4, 1946. He was born a national of the United States alone. He at no time had dual nationality. American nationality was his birthright. *Toyota* v. *United States*, 268 U. S. 402; *Gonzales* v. *Williams*, 192 U. S. 1. To this effect, the court below also found (R. 26).

The contention is, however, that by virtue of the United States-Phillipine Independence Treaty and the Presidential Proclamation of July 1946 (*supra*), the respondent was divested of his nationality and thereupon cloaked with alienage. Such conclusion has never been reviewed by this Court. It presently rests upon the rationale of the court below in the case of *Cabebe* v. *Acheson*, 183 F. 2d 795, wherein it was declared:

> * * * the Phillipine Islands came to the United States by cession. And, by such acquisition many individuals became nationals of the United States. Later, the United States relinquished sovereignty over them and their country. It follows that Filipino nationals of the United States inhabiting the Island at the date of such relinquishment lost the status of nationality. The narrower question follows: Does such loss also occur as to Filipino-nationals of the United States domiciled in the United States? * * * (p. 880)

> * * * The status of United States nationality for Filipinos was the direct result of the United States' assumpion of sovereignty over the Islands. When the United States relinquished its sovereignty, there remained no basis for such status.
>
> The United States had it desired it, could have provided that Filipinos permanently residing in the United States would not lose their United States nationality upon the recognition of Philippine independence * * *.
>
> The question is not directly answered (but, as we think, it was inferentially answered) * * * there is no special reference of inclusion or exclusion in any of these acts to Filipinos who were no longer residing in the islands on the date of their independence, * * *. (p. 801)
>
> * * * It is our conclusion that the United States government intended the status of Filipinos, regardless of domicile or place of residence at tse date of Philippine independence, to be entirely separate from any phase of adherence to the United States. (p. 802)

The power of the United States as a sovereign nation to cede, dispose of or otherwise relinquish its sovereignty, *nolens volens,* over parts of its territory, *together with the inhabitants residing therein subject to American sovereignty,* is not here challenged. Presuming this to be an incident of sovereignty, *Jones* v. *United States,* 137 U. S. 702; *De-Lima* v. *Bidwell,* 182 U. S. 1, it becomes an entirely different proposition to assert as an incident of soverignty the right to expatriate or divest of nationality, *nolens volens* (and expel from this country)[8] nationals of the United States residing outside the ceded territory and within the jurisdiction of the United States at the time of cession, because of birth within said territory.

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8 Stripped of nationality, Congress may order the expulsion of Filipinos for any or no reason. *United States ex rel. Harisiades* v. *Shaughnessy,* 342 U. S. 580, 567, 598.

It is respondent's contention that the rights of nationals so situated are no different than would be those of United States citizens.

B.

United States citizens cannot be divested of their nationality except through expatriations. The fundamental basis for expatriation is that there must be a voluntary act on the part of the individual to shed his nationality. In *Perkins* v. *Elg*, 307 U. S. 325, 334, the Court said:

Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. To the same effect, see *Savorgnan* v. *United States*, 338 U. S. 491, 497, 498; *MacKenzie* v. *Hare*, 239 U. S. 299.

That Congress cannot by fiat declare a loss of nationality has been held by this Court on many occasions. In discussing that proposition the Court said in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 703.

> The power of naturalization, vested in congress by the constitution, is a power to confer citizenship, not a power to take it away. 'A naturalized citizen', said Chief Justice Marshall, 'becomes a member of the society possessing all the rights of a native citizen and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, * * *. Congress having no power to abridge the rights conferred by the constitution upon those who have become naturalized citizens by virtue of acts of congress, a fortiori no act or omission of congress, * * * can affect citizenship acquired as a birthright, by virtue of the constitution

itself, without any aid of legislation. The fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship.

C

It is undisputed that respondent never voluntarily renounced or abandoned his United States nationality or committed any act inconsistent with the rights or obligations of such nationality. It is urged by the government, however, that respondent and all other persons of Filipino birth residing in this country prior to 1934, automatically lost their nationality by the treaty establishing the independence of the Philippine Islands.

If nationality is analogous to, and cloaked with the same protection that is accorded citizenship, then clearly respondent could not be divested of his nationality by that treaty, *residing as he did in this country*, than if he were a citizen. For the Philippine Independence Act of 1934 and the Treaty constituted no voluntary act of renunciation or self-expatriation on the part of respondent. He did not vote on the ratification of the Independence Act of 1934; nor could he have voted thereon so long as he elected to remain within this country.

Is nationality, then, analogous to and protected like citizenship? Either it is, or else it must be analogous to alienage, for the constitution with respect to nationality recognizes only the two categories.

The Constitution speaks of "citizens" and "natural born citizens" of the United States in Article I and Article II, and of "citizens or subjects" of foreign states in Article III. Before the passage of the Fourteenth Amendment it

contained no definition of citizen. The Fourteenth Amendment says in its opening sentence, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The term "national" does not appear anywhere in the Constitution of the United States.

Because of this particularity in the language of the Constitution, any status recognized by the law, other than that of citizenship or alienage, must be assimilated to citizenship or alienage if it is to comport with the Constitution. Distinctions may be made among citizens, and also among aliens, but any classes or sub-classes into which citizens or aliens may be divided may not combine the two major and mutually exclusive classes recognized by the Constitution. Unless this is so, the words of the Constitution are meaningless. An alien has been defined by this court in *Low Wah Suey* v. *Backus,* 225 U. S. 460, 473, as:

> One born out of the jurisdiction of the United States, and who has not been naturalized under their Constitution and laws.

The essence of this definition is birth outside of the jurisdiction of the United States. This is the characteristic which distinguishes the alien and sets him apart in a class different from the citizen and national. Respondent having been born under the jurisdiction of the United States, lacked this essential characteristic of alienage. On the other hand, he was endowed with the positive essential characteristic of citizenship, to wit: *birth within the jurisdiction of the United States.*

Next to birth, the all-important requirement and characteristic of citizenship is allegiance and fealty to the government. And this, too, is a concomitant of nationality. Speaking of persons born in the Philippine Islands, this court said in *Toyota* v. *United States* (*supra,* 410)

> The citizens of the Philippines are not aliens. See *Gonzales* v. *Williams*, 192 U. S. 1, 13. They owe no allegiance to any foreign government.

In the earlier case of *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176, this court in referring to the Philippine Islands, said "Their allegiance became due to the United States and they became entitled to its protection" (p. 179).

In the Nationality Act of 1940, 54 Stat. 1137, 8 U. S. C. 501 (b), adopted after the Philippine Independence Act, congress equated nationals with citizens:

> The term "national of the United States" means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. *It does not include an alien.* (Emphasis supplied.)

This concept, expressed in the 1940 Act was carried forward in the present 1952 law. Section 101(a)(3) of the Act. 8 U. S. C. A. 1101(a)(3), defines an alien to be

> Any person not a citizen or national of the United States.

and it defines a national of the United States (Section 101(a)(22) 8 U. S. C. A. 1101(a)(22)) as:

> (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

As part of his allegiance, a national is subject to the duty of bearing arms and giving his life, if need be, in defense of this country. This respondent and all native born Filipinos in this country have been subject to that duty and obligation *equally with all citizens.*

Thus, by the similarity of birth under United States jurisdiction; by the similarity of like allegiance to this country; by the similarity of like obligation to serve, defend and safeguard this country; by the similarity of the like protection due to them from this country, nationals have been equated with citizens. On the other hand, in no significant characteristic can they be equated with aliens. In fact, in every decision of this Court, where the character of nationality had been discussed, the Court was sharp to point out that nationality cannot be equated with alienage. *Gonzales* v. *Williams, supra; Toyota* v. *United States, supra.*

It must therefore follow, that nationality, like citizenship, may not be lost, divested, forfeited or impaired without a voluntary act of renunciation or abandonment. Respondent, therefore, is still a national.

Assuming, however, that power to expatriate nationals resides in Congress, it is not seriously contended that Congress has so acted with reference to Filipinos residing in this country prior to the adoption of the Independence Act of 1934. This was admitted by the court below in the *Cabebe* case (*supra*) when it held a loss of nationality had taken place. The Court said:

> The question is not directly answered but, as we think, it was inferentially answered) * * * *there is no special reference of inclusion or exclusion in any of these acts to Filipinos who were no longer residing in the Islands on the date of their independence.* (p. 801)

The Court there relied upon various acts of Congress from which it drew an inference that Congress must have intended to denationalize Filipinos residing in the United States.

Respondent's nationality, with which he was born, and which he has at all times maintained by unequivocal acts,

may not be taken away by inference. See, *Mandoli* v. *Acheson,* 344 U. S. 133. In upholding United States nationality in *Perkins* v. *Elg,* 307 U. S. 325, 337, this Court said:

> If the abrogation of that right [to elect nationality] had been in contemplation, it would naturally have been the subject of a provision suitably explicit. Rights of citizenship are not to be destroyed by an ambiguity.

The Court has never been unmindful that the law abhors forfeitures and will favor that construction of a statute which avoids such result. *Washingtonian Pub. Co.* v. *Pearson,* 306 U. S. 30, 41; *United States* v. *One Ford Coach,* 307 U. S. 219, 226; *Knickerbocker Life* v. *Norton,* 96 U. S. 234, 242. Expatriation of respondent is a forfeiture of the nationality he obtained by birth,—a forfeiture which deprives him of "all that makes life worth living". In a case involving the construction of a deportation statute, this Court said:

> We resolve the doubts in favor of that construction [avoiding deportation] because deportation is a drastic measure and at times the equivalent of banishment or exile, * * * It is the forfeiture * * * of a residence in this country. Such a forfeiture is a penalty * * * since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used. Fong Haw Tan v. Phelan, 333 U. S. 6, 10.

If resulting deportation evoked such concern from the Court because it is a forfeiture of residence in the United States, how much more should the Court be concerned where an implied construction is being used to deprive respondent, not only of his reseidence, but of his birthright his United States nationality. See also *Bennett* v. *Hunter,* 76 U. S. 326, 336.

CONCLUSION

On the basis of the foregoing, it is respectfully submitted that the order of the court below should be affirmed.

Respectfully submitted,

Dated: March, 1954.

BLANCH FREEDMAN
220 Broadway
New York City, New York

GLADSTEIN, ANDERSEN & LEONARD
by LLOYD E. MCMURRAY
240 Montgomery Street
San Francisco, California
Counsel for Respondent

On the brief:

BLANCH FREEDMAN
LLOYD E. MCMURRAY
DAVID M. FREEDMAN

APPENDIX

The applicable portions of the statutes involved in this case are as follows:

1.

39 Stats. 889, the Act of February 5, 1917, C. 29, Sec. 19(a), 8 USCA §155(a).

Sec. 155—Deportation of Undesirable Aliens Generally:

> * * * any alien who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within 5 years after the entry of the alien into the United States, or who was sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within 30 days thereafter, due notice having first been given to representatives of the state, make a representation to the Attorney General that such aliens shall not be deported in pursuance of this chapter * * *.

2.

The Philippine Independence Act of March 24, 1934, 48 Stats. 456, 48 U.S.C.A. §1231 et seq.

CHARACTER OF CONSTITUTION—MANDATORY PROVISIONS:

Sec. 2(a). The constitution formulated and drafted shall be Republican in form, shall contain a bill of rights, and shall, either as a part thereof or in an ordinance appended thereto, contain provisions to the effect that, pending the final and complete withdrawal of the sovereignty of the United States over the Philippine Islands—

(1) All citizens of the Philippine Islands shall owe allegiance to the United States.

* * *

RELATIONS WITH THE UNITED STATES PENDING COMPLETE INDEPENDENCE:

Sec. 8(a). Effective upon the acceptance of this Act by concurrent resolution of the Philippine Legislature or by a convention called for that purpose, as provided in Section 17.

(1) For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except section 13(c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty * * *.

* * *

Appendix

IMMIGRATION AFTER INDEPENDENCE:

Sec. 14. Upon the final and complete withdrawal of American sovereignty over the Philippine Islands the immigration laws of the United States * * * shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries.

3.

Act of August 7, 1939, 53 Stats. 1226, amending the Philippine Independence Act of 1934.

* * * Sec. 2—Sec. 8 of the said Act of March 24, 1934, is hereby amended by adding thereto a new subsection as follows:

(d) Pending the final and complete withdrawal of the sovereignty of the United States over the Philippine Islands, except as otherwise provided by this Act, citizens and corporations of the Philippines shall enjoy in the United States all of the rights and privileges which they respectively shall have enjoyed therein under the laws of the United States in force at the time of the inauguration of the Government of the Commonwealth of the Philippine Islands.